United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by:
Dante M. Scaccia

Docket No. 75-1201

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

—*v*—

FRANK S. CANNONE, STANLEY A. RAPPUCCI, THOMAS A. GAETANI, JON N. ENGLISH, JOSEPH N. MARUCA, VINCENT N. CHRISTINA, ANTHONY R. SANTACROSE, JR., RAYMOND D. MASCIARELLI, JAMES W. McGRATH, ANDREW J. QUINLAN and THOMAS A. ABBADESSA,

Appellees.

—and—

UNITED STATES OF AMERICA,

Appellant,

—*v*—

RAYMOND D. MASCIARELLI and LAWRENCE SCHULTZ,

Appellees.

On appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLEES
(Masciarelli and McGrath).

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. DO THE FEDERAL COURTS HAVE THE AUTHORITY TO ORDER THE GOVERNMENT TO DISCLOSE TO THE DEFENSE THE NAMES AND ADDRESSES OF THE GOVERNMENT'S WITNESSES IN ADVANCE OF TRIAL?

2. WHEN SUCH A PRETRIAL DISCLOSURE ORDER IS GRANTED FOR THE PURPOSE OF ADEQUATELY PREPARING A DEFENSE, IS SUCH A PRETRIAL DISCOVERY ORDER APPEALABLE?

POINT I

THE FEDERAL COURTS HAVE THE INHERENT POWER TO GRANT PRETRIAL DISCOVERY.

A party preparing his defense to a criminal prosecution is often confronted with the necessity of overcoming and impeaching the incriminating effects of testimony given by government witnesses who are or may be unknown to the defense prior to trial. Disclosure of the identity of the government's witnesses can be of great value to counsel for the defendant in appraising the exact extent of the damaging nature of such witnesses' testimony. As in the case of motions directed at obtaining production of defendants' statements given the government, it is not surprising to see so many motions directed at obtaining disclosure of government

witnesses. Concededly there is a lack of uniformity in judicial handling of such requests. Appellees Masciarelli and McGrath, as defendants in the instant two cases, argue that the power of the federal judiciary, under both the Federal Rules of Criminal Procedure, and the court's inherent authority, exists to honor a request for pretrial discovery of the names and addresses of witnesses intended to be called by the government at trial.

At early common law no right of inspection was conceded the accused. The King v. Holland, 4 T.R. 691, 100 Eng. Rep. 1248 (K.B. 1792); See People ex rel Lemon v. Supreme Court, 245 New York 24, 156 N.E. 84 (1927); 6 Wigmore Evidence §§1859(g) (3rd ed. 1940). As the law developed, however, the courts shifted somewhat from their earlier position and showed a more conciliatory attitude where inspection was sought of documents that might be received as exhibits. E.g. Rex v. Harrie, 6 Car. & P. 105, 172 Eng. Rep. 1165 (1833) (letter forming basis of indictment for sending a threatening letter); Regina v. Spray, 3 Cox Cr. Case 221 (1848) (stomach contents in homicide prosecution); The

People v. Gerold, 265 Ill.448, 107 N.E. 165 (1914) (books and documents on charge of defalcation). Though it is often assumed that pretrial inspection and discovery in the federal courts had its advent upon the adoption of the federal rules, their reports show that the federal courts were not insensitive to the liberalizing treatment in the law, and were, in fact, granting inspection of documents to be used as evidence at trial as far back as 1807. United States v. Burr, 25 Fed. Cas. 30, No. 14692d (C.C.D. Va. 1807) (Marshall C. J., sitting as Circuit Justice). See also United States v. Warren, 53 F. Supp. 435 (D. Conn. 1944); United States v. B. Goedde & Co., 40 F. Supp. 523 (E.D. Ill. 1941); United States v. Rich, 6 Alaska 670 (1922); Orfield, Discovery and Inspection in Federal Criminal Procedure, 59 W. Va. L. Rev. 221, 233-39 (1957); Note, The Scope of Criminal Discovery Against the Government, 67Harv.L.Rev.492,493(1954). Although there is some doubt as to whether Rules 16 and 17(c) codified pre-existing procedures or presented thoroughly new procedures, it is clear that their introduction in 1945 provided the federal bench for the first time with specific authorization for granting pretrial inspection. McGuire, Trial Judge Looks at the Rules, 5 F.R.D. 162,

166 (1945); McInerney, Proceedings Between Indictment and Trial, 5 F.R.D. 156, 161 (1945). See NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 15 (1945).

Decisions of the Supreme Court of the United States repeatedly have recognized the federal judiciary's inherent power to require the prosecution to produce the previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced. See e.g. Jencks v. United States, 353 U.S. 657 (1957); Gordon v. United States, 344 U.S. 414 (1953); Goldman v. United States, 316 U.S. 129 (1942); Palermo v. United States, 360 U.S. 343, 361 (1959). At issue here is whether, in a proper case, the defense can call upon the same power for production of witnesses' names and addresses that facilitate "full disclosure of all [relevant] facts." United States v. Nixon, 418 U.S. 683, 707 (1974). In this case, the defense proposed, and the court granted it the right, to obtain the identity of government witnesses to prepare a defense and to impeach the trial testimony of the prosecution's

witnesses who would testify at the trial. It is evident that of the eleven defendants accused in the two instant indictments, that testimony of non-party witnesses would be essential in order for the government to make out a prima facie case at trial. Since the defense has never been afforded any information as to the identity of the government's witnesses to be called at trial, it becomes obvious as to the necessity for obtaining such disclosure in order for the accused to prepare a defense to overcome the evidence to be given by the government witnesses, and to engage in the necessary pretrial investigation in order to impeach the testimony of such witnesses. Such disclosure not only facilitates plea discussions and agreements, but also goes to the heart of the general proposition that defense counsel must be permitted to prepare adequately to cross-examine the witnesses against the accused, and otherwise test their credibility, as well as to produce other evidence relevant to the facts in issue. It has been suggested that the right to advance notice of witnesses against one "and their prior statements" may be required by the Sixth Amendment and by due process. Palermo v. United States, 360 U.S. 343, 326-66 (1959); See Jencks v. United States, 353 U.S. 657 (1957); Note, 20 Okla.

L. Rev. 422 (1967).

The government in its brief (G. Br., 10) argues that Rule 16 of the Federal Rules of Criminal Procedure deprives the trial court of the power to order disclosure of the government's witnesses. Acknowledging that Title 18, United States Code Section 3432 requires pretrial disclosure of the government's witnesses in capital cases only, this is not to say that the court nonetheless may not order such disclosures in non-capital cases. Though precluded from proceeding under Rule 16, the courts remain free to direct discovery under their inherent authority to administer justice in federal courts. Shores v. United States, 174 F 2d 838 (8th Cir. 1949); United States v. Pete, 111 F. Supp. 292 (D.D.C. 1953). Use of its inherent power was exercised many times prior to the adoption of the rules, and there is no evidence indicating that the federal rules were intended to entirely supplant this residual power in the courts. See Note, The Scope of Criminal Discovery Against the Government, 67 Harv. L. Rev. 492 (1954). See also Fed. R. Crim. P. 57(b): "---If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules---". Authority for this proposition

may be found in related fields where proceedings outside the scope of the rules have been sanctioned as necessary for the protection of the rights of the parties. In Gordon v. United States, 344 U.S. 414 (1953), the Supreme Court reversed the denial of a motion for production and inspection at the time of trial, although no authorization for this procedure was found in the rules. On June 23, 1975, the Supreme Court held that neither Fifth Amendment's privilege against self-incrimination, pretrial discovery limitation of Fed. R. Crim. P. 16, attorney-work product doctrine of Hickman v. Taylor, 329 U.S. 495, nor Sixth Amendment rights to compulsory process and cross-examination prevent trial court from requiring defense, as condition for offering testimony from defense investigator to impeach credibility of prosecution witnesses, to produce for prosecution inspection portions of investigator's written report as to his interviews of these witnesses. U.S. v. Nobles, No. 74-634, 43 LW 4806 (June 24, 1975).

The only argument the government makes against disclosure of government witnesses, other than the challenge to the court's authority, is a claimed risk of harm to the witnesses. If the

trial judge had perceived of any such risk of harm, the court could, and, we are confident would, have provided for proper and adequate safeguards and possible alternatives to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury.

POINT II

PRETRIAL DISCOVERY ORDERS REQUIRING THE DISCLOSURE OF THE NAMES OF THE GOVERNMENT'S WITNESSES IN A CRIMINAL CASE ARE NOT FINAL IN THE ABSENCE OF A REFUSAL BY THE GOVERNMENT TO COMPLY WITH THE ORDER OF THE COURT, AND, THEREFORE, SUCH A DISCOVERY ORDER IS NOT APPEALABLE.

A. The courts have been reluctant to entertain piecemeal appeals, particularly in the field of attempted appeals from discovery orders. See e.g. United States v. Fried, 386 F. 2d 691 (2nd Cir. 1967) (non-party witness sought review of order requiring his presence for testimony, alleging that his attendance could seriously jeopardize his health). The generally accepted route for review of such orders is to refuse to comply with the order, be held in contempt, and appeal from that order. Alexander v. United States, 201 U.S. 117, 121(1906).

If contempt of the order is considered criminal rather than civil, it is immediately appealable, even though the citation is directed against a party. See e.g. Hanley v. James McHugh Construction Co., 419 F. 2d 955 (7th Cir. 1969).

B. The government argues that even if these are not appealable orders, this court should treat this appeal as a petition for a Writ of Mandamus (G.Br., 8). Presumably the government's argument is for mandamus under 28 U.S.C. §1651 (1970). The All Writs Act authorizes federal courts "to issue all writs necessary or appropriate in aid of their jurisdiction and agreeable to the usages and principles of law." Pursuant to this provision, the circuit courts of appeals may issue, inter alia, writs of mandamus to the district courts, requiring those courts to take certain actions. Traditionally such writs were reserved for "extraordinary situations or matters affecting the court's jurisdiction." Note: Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 377 (1961). See ex parte Fahey, 332 U.S. 258, 260 (1947); note, supra note 1 at 338. Mandamus did not give federal appellate courts power to review "any unappealable order which [the court] believe[s]

should be immediately reviewable in the interest of justice." In re Josephson, 218 F. 2d 174, 177 (1st Cir. 1954).

Summarizing the situations where mandamus is available, the First Circuit has stated that the "extraordinary circumstances" where mandamus may apply include (1) clear abuses of discretion by the district court; (2) situations where there is a need to confine an inferior court to the lawful exercise of its jurisdiction, or to compel it to act when it is under a duty to do so; and (3) situations "raising important issues of first impression." In re Ellsberg, 446 F. 2d 954 (1st Cir. 1971).

CONCLUSION

The Appellees Masciarelli and McGrath respectfully submit that this Court should dismiss the instant appeal since it lacks appealability under federal law, and in any event there is ample authority to affirm the district court's power to grant pretrial disclosure to the defense in a criminal case; furthermore, this Court should impose sanctions upon the

appellant in the event of the government's threatened or actual refusal to comply with the district court's disclosure order.

Respectfully submitted,

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LETTER OF TRANSMITTAL

Date: July 16, 1975

Hon. A. Daniel Fusaro, Clerk
U. S. Court of Appeals, Second Circuit
Room 1702 U.S. Court House
Foley Square
New York, N. Y. 10007

Re: United States of America v. Frank S. Cannone, et al.
Docket ~~Index~~ No. 75-1201

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

[--] ~~Records~~

[25] **Briefs**

[--] ~~Original Record enclosed~~

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cc: Love, Balducci & Scaccia

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